

SAW CHENG BOON

v.

MOHD. FAROOK B SHAIK MOHAIDIN

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[ORIGINATING MOTION NO. 25-68-94]
4 MAY 1995

LAND LAW: *Private caveat - Application for removal - Registered proprietor lodging caveat on own land - Whether valid - Whether registered proprietor "person or body claiming title" pursuant to s. 323(1)(a) National Land Code.*

STATUTORY INTERPRETATION: *Section 323(1)(a) National Land Code - Meaning of "any person or body claiming title to or any registrable interest in, any alienated land or any right to such title or interest."*

The respondent was the registered proprietor of a piece of land known as PT No. 2601 Suratan Hakmilik Sementara No. HS (D) 2600 Mk 11 (the said land) and had charged his land to Bank Bumiputra Malaysia Bhd (BBMB). In default of payment, BBMB obtained an order for sale against the said land, which was then sold to the applicant through a public auction. The respondent, however, had lodged a private caveat against his own land pending the outcome of his appeal against the dismissal of his application to annul the auction. The applicant applied for removal of the said caveat.

The sole preliminary question to be resolved by the Court was whether a registered proprietor can enter a private caveat against his own land, as a person or body claiming title to or any registrable interest in the land within the meaning of s. 323(1)(a) National Land Code.

Held:

[1] A person who relies on his status as registered owner must necessarily be a person already possessing title or interest in the land and not merely a person claiming title to or any interest in that land and must as a matter of logic have been excluded by the language of s. 323(1). Section 323(1)(a) clearly and unambiguously provides that only a person or body claiming title to or any registrable interest in any alienated land or any right to any such title or interest, may caveat the land.

[2] For a person who had filed a suit concerning his land to logically claim that he is in a position of one claiming title or interest in such land would entail an unwarranted stretch of language, since he is already the legal owner of the title, and as such legal owner, the question of "any right to any such title or interest" also could not possibly arise.

[3] Section 320(1)(a) of the National Land Code provides that a registered title holder may, to protect his interests, apply to the Registrar or Land Administrator for an entry of the Registrar's caveat. He is not bereft of any remedy and ought thereby to be precluded from having recourse to remedies not provided by statute.

[Order granted in terms of application with costs].

Cases referred to:

Eu Finance Bhd. v. Island Sdn. Bhd. (M & J) Frozen Food Sdn. Bhd., Intervener [1989] 1 MLJ 195 (foll)

In Re An Application by Haupiri Courts Ltd. (No.2) [1969] NZLR 353 (refd)

Asia Commercial Finance (Berhad) & Anor. v. Development and Realtor Sdn. Bhd. [1992] 2 MLJ 504 (refd)

- a* *Hiap Yiak Trading Sendirian Berhad & Ors. v. Hong Soon Seng Sdn. Bhd.* [1990] 2 MLJ 155 (*refd*)
Raju, J a/l M. Kerpaya @ Jayaraman a/l M. Kerpaya v. Kwong Yik Bank Berhad & Anor. [1994] 2
 AMR 24 (*refd*)
Barry v. Heider [1914] 19 CLR 197 (*refd*)

Legislation referred to:

National Land Code, ss. 319, 320(1), (1)(a), 323(1)(a), 418(1), (3)

- b* **Other sources referred to:**

National Land Code, Judith E Sihombing, 1981 Edn., p. 594

The Torrens System in Malaya, S.K. Dass, pp. 333 - 334

For the applicant - Mohd Azman bin Harun; M/s. Arifin & Co.

For the respondent - Raj Shanker; M/s. Rajasingam & Co.

- c* **JUDGMENT**

Vincent Ng Kim Khoay J:

- d* This was an application by the applicant Saw Cheng Boon to remove a private caveat lodged by the respondent over all that piece of land known as PT No. 2601 Suratan Hakmilik Sementara No. HS (D) 2600 Mk 11, Seberang Perai Tengah (hereinafter referred to as the said land).

At the hearing of this application, learned Counsel for the applicant raised the preliminary issue whether a registered proprietor can caveat his own land. It is undisputed that the respondent was the registered proprietor of the said land at the time he lodged the private caveat.

- e* The respondent had charged his land to the chargee, Bank Bumiputra Malaysia Bhd (BBMB), and when he defaulted BBMB obtained an order for sale against the land, which was thereby sold to the applicant who now claims to be a *bona fide* purchaser for value through a public auction by Court order held on 1 June 1994.

- f* The respondent's grounds in his affidavit objecting to this application are basically similar to his grounds in his application to annul the auction held on 1 June 1994 under originating summons No. 219 of 1987, which application was heard on 20 December 1994 by Penang High Court No. 1 and dismissed. I am informed that there is an appeal pending against the dismissal.

- g* The sole preliminary question to be resolved at this juncture is whether a registered proprietor can enter a private caveat against his or its own land, as a person or body claiming title to or any registrable interest in the land within the meaning of s. 323(1)(a). As a caveat is a creature of statute, it may be entered only by a person or body upon whom a right to enter it has been conferred by the statute. Thus, the determination of this issue hinges singularly upon the Court's construction of s. 323(1)(a) of the National Land Code.

- h* Under sub-section (1)(a) of s. 323, a person or body which has the right to enter a private caveat is, "any person or body claiming title to or any registrable interest in, any alienated land or any right to such title or interest." The words used here are crystal clear, simple and in exact terms. Hence, I wholly agree with and support the *ratio decidendi* of L.C. Vohrah J in the case of *Eu Finance Bhd. v. Island Sdn. Bhd. (M & J) Frozen Food Sdn. Bhd., Intervener* [1989] 1 MLJ 195 which ran as follows:

- i* In my view, a person who relies on his status as registered owner must necessarily be a person already possessing title or interest in the land and not merely a person claiming title

to or any interest in that land and must as matter of logic have been excluded by the language of s. 323 (1).

As has been very succinctly put by the learned author Judith E Sihombing in her *National Land Code* (1981 Edn.) at p. 594:

one difficulty involved is that of deciding his standing under s. 323 for he is not ‘claiming’ title to the land: title is already his.

Support for this view can be found in *Re An Application by Haupiri Courts Ltd.* (No.2) [1969] NZLR 353. Also, in *Asia Commercial Finance (Berhad) & Anor. v. Development and Realtor Sdn. Bhd.* [1992] 2 MLJ 504 @ 515, Edgar Joseph Jr J (as he then was) supported the ratio in *Eu Finance Berhad* but rejected the ratio in *Hiap Yiak Trading Sendirian Berhad & Ors. v. Hong Soon Seng Sdn. Bhd.* [1990] 2 MLJ 155 which dealt with the same point.

The respondent had sought to distinguish the current case from cases of *Eu Finance Bhd.* and *Asia Commercial Finance Bhd.* by contending that neither of two cases had laid down the principle that a registered proprietor could not **under any circumstance** caveat his own land, whereas in the current case the filing of the suit by the respondent ought to be considered an interest in land or a registrable interest in land within the ambit of s. 323(1)(a) of the National Land Code. And where such proceedings have been commenced e.g. to set aside a sale (as here), he is entitled to caveat his own land pending disposal of the proceedings which would encompass the pending appeal against the application to annul the public auction. I do not agree that s. 323(1)(a) is wide enough to encompass such a situation, due to its clear and unambiguous language.

Counsel for the respondent also cited the case of *Raju, J a/l M. Kerpaya @ Jayaraman a/l M. Kerpaya v. Kwong Yik Bank Berhad & Anor.* [1994] 2 AMR 24 p. 1220 in support of his argument. In my view, this case cannot be taken as authority that a registered proprietor has *locus standi* to enter a caveat against his land under s. 323(1)(a) National Land Code as it has been conceded by Counsel for the respondent that this issue was not the *ratio decidendi* of that case and it was cited as oblique authority due to the absence of adverse comments by the Supreme Court against the registered proprietor therein who had caveated his own land. As, s. 323(1)(a), clearly and unambiguously provides that only a person or body claiming title to or any registrable interest in any alienated land or any right to any such title or interest, may caveat the land, surely, for a person who had filed a suit concerning his land to logically claim that he is in the position of one claiming title or any registrable interest in such land, would entail an unwarranted stretch of language, since he is already the legal owner of the title, and as such legal owner, the question of “any right to any such title or interest” also could not possibly arise.

Furthermore, in my view, as s. 320(1)(a) of the National Land Code provides that a registered title holder may, to protect his interests, apply to the Registrar or Land Administrator for an entry of the Registrar’s caveat “for the prevention of fraud or **improper dealing**”, where the facts disclose *prima facie* such dealing (e.g. a fraudulent or forged transfer), he is not bereft of any remedy and ought thereby to be precluded from having recourse to remedies not provided by statute. And indeed, he may appeal to the Court under s. 418(1) and (3) of the Code, in the event of the Registrar’s or Land Administrator’s “refusal” to register a Registrar’s caveat.

a In *Barry v. Heider* [1914] 19 CLR 197 - an Australian case - the right of a registered proprietor to enter a caveat on his own land as an unpaid vendor's lien was recognised. But, here in Malaysia, I doubt that s. 323(1) of the National Land Code - due to its clear wording - could accommodate the principle in equity regarding an unpaid vendor's lien which results in giving the registered proprietor the right to caveat his own land.

b It may be pertinent for the Court to consider s. 166 of the 1926 Land Code which is in *pari materia* with s. 323 of the National Land Code. S.K. Dass had, in his work, *The Torrens System in Malaya*, this to say about s. 166 (at pp. 333 to 334):

It is doubtful if s. 166 entitles him to lodge a caveat in such circumstances for "any person" must obviously refer to a person other than the proprietor, who until registration of an adverse interest, continues to have an indefeasible title and registered interest in the land. He may protect his interest by moving the proper registering authority to lodge a caveat for the

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prevention of fraud or improper dealing.

For the above reasons, I hold that since the statute itself had created a specific method in s. 319(1) and 320(1) of the N.L.C. for the protection of the rights and interest of the title holder in certain situations and Parliament appears to have intended that this method shall be exclusive, s. 323 - on a proper reading of its crystal clear provisions - is thereby not available to the applicant to allow him to caveat his own land on the grounds, e.g. as here, that he had filed proceedings to annul the auction held on 1 June 1994 under originating summons 219/87, which application was indeed dismissed on 20 December 1994.

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I accordingly grant order in terms of all the prayers in the applicant's originating motion therein with costs to the applicant.

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